

No. 5:10-CR-10-FL-1
No. 5:11-CV-583-FL

Respondent.

ORDER

BACKGROUND

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arguing that under Simmons, he should not have received the career offender enhancement. The government moves to dismiss on the basis that petitioner waived his right to bring a § 2255 petition in his plea agreement. The magistrate judge agreed, and petitioner objects on grounds that his Simmons claim falls outside the scope of his waiver in his plea agreement.

DISCUSSION

“[A] criminal defendant may waive his right to attack his conviction and sentence collaterally, so long as the waiver is knowing and voluntary.” United States v. Lemaster, 403 F.3d 216, 220 (4th Cir. 2005). Contrary to petitioner’s argument regarding the scope of his waiver, the Fourth Circuit has recently confirmed that “claims regarding the application of Simmons fall within the scope of [a] valid appeal waiver.” United States v. Copeland, 707 F.3d 522, 529-30 (4th Cir. 2013). Here, petitioner agreed to waive the right to challenge his conviction “except[] . . . upon grounds of ineffective assistance of counsel or prosecutorial misconduct.” (DE 28). Petitioner does not allege, nor is there evidence to suggest, that his plea was either unknowing or involuntary. Accordingly, petitioner has waived his right to attack his conviction and sentence collaterally on the basis of Simmons, and his motion to vacate must be dismissed on this ground.

CONCLUSION

For the foregoing reasons, the court ADOPTS the recommendation of the magistrate judge (DE 52), GRANTS the government’s motion to dismiss (DE 47), and DISMISSES petitioner’s motion to vacate (DE 42). Finding no substantial issue for appeal concerning the denial of a constitutional right, see 28 U.S.C. § 2253(c)(2), a certificate of appealability is DENIED.

SO ORDERED, this 3rd day of April, 2013.



LOUISE W. FLANAGAN
United States District Judge